



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 3, 2015

Jennifer Gore
Miller and Owen
A Professional Corporation
428 J Street, Suite 400
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-15-071

Dear Ms. Gore:

This letter responds to your request for advice, on behalf of the Capital SouthEast Connector Authority (the "JPA") regarding Section 1090 and the provisions of the Political Reform Act (the "Act").¹ Please note that we do not advise on any other area of law, including the Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Orange County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice (if any) "is not admissible in a criminal proceeding brought against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTIONS

Do the conflict-of-interest provisions of the Act or Section 1090 prohibit Derek Minnema, the JPA's Project Manager for the connector project (the "Project") from taking part in decisions regarding:

1. A preliminary engineering and environmental documentation contract (the "Contract") for a 7.2 mile segment of the Project (the "D2 Segment") where his former employer, Mark Thomas & Co. ("MTCO"), would bid on the Contract?
2. The D2 Segment that does not involve the Contract?
3. Elements of the Project that do not involve the Contract or the D2 Segment?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Yes. Under the Act, it is reasonably foreseeable that the financial effects of the decisions on MTCO will be material. Accordingly, Mr. Minnema may not take part in any decisions regarding the Contract, provided that Mr. Minnema recuses himself from all decisions regarding the Contract as required by the Act, Section 1090 does not apply.

2 and 3. No, provided that the decisions in which he does not have a conflict of interest can be segmented from those in which he has a conflict, as discussed below.

FACTS

The JPA is a joint powers authority that was formed by the counties of El Dorado and Sacramento and the cities of Elk Grove, Folsom and Rancho Cordova. The JPA is charged with planning and constructing a 35-mile multi-modal roadway to connect Interstate 5, State Route 99 and U.S. Route 50. The JPA recently issued a Request for Proposal (“RFP”) for the drafting of preliminary engineering and environmental documents for the D2 Segment.

Mr. Minnema, who is employed by Drake, Haglan & Associates, a consulting firm that has contracted with the JPA to provide services for the project, serves as the Project Manager.

The JPA has determined that Mr. Minnema is a “public official” under the Act and an “employee” subject to Section 1090.

Prior to his employment by Drake Haglan & Associates, Mr. Minnema worked for MTCO, a private consulting firm that has expressed an interest in bidding on the Contract.

During his tenure at MTCO, Mr. Minnema acquired company common stock that the company redeemed when he left in 2014. Under the redemption agreement, the value of his stock was fixed and MTCO is obligated to pay him for the stock in quarterly payments until April 1, 2018. The payments exceed Mr. Minnema’s annual salary from the JPA. In addition, MTCO gave Mr. Minnema an interest bearing promissory note for the obligation. Currently the interest payments exceed \$500 within a 12-month period but will eventually fall below \$500 as the note’s maturity date draws closer.

Mr. Minnema also participated in the company’s employee stock option plan (“ESOP”). On January 1, 2015, his ESOP account was converted from MTCO stock to a segregated “Undistributed Account” in the amount of the stock’s 2014 fair market value. Mr. Minnema will receive four annual distributions from the ESOP starting in 2015.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest.

As the Project Manager for the JPA, Mr. Minnema is a public official and makes and, participates in making governmental decisions regarding the Project.

Financial Interests

SOURCE OF INCOME

Interests from which a conflict of interest may arise are defined in Section 87103 and include any source of income to the official, including promised income that aggregates to \$500 or more within 12 months prior to the decision.

According to the facts you have provided, Mr. Minnema has received income from MTCO in the form of salary and stock that the company contributed to his ESOP account while he worked at MTCO. In addition, he will receive future promised income from MTCO under the redemption agreement and the ESOP.

Payments Mr. Minnema receives from the ESOP are not “income” under Section 82030(b)(11) because they are made from a defined benefit plan qualified under Internal Revenue Code Section 401(a).

Payments under the redemption agreement would ordinarily cause Mr. Minnema to have a financial interest in MTCO as a source of income. However, there is a limited exception for income from a former employer found in Regulation 18700.1(b). Under this exception, an official does not have an interest in a former employer as a source of income if the income was received by or accrued to the public official prior to the time he or she became a public official, the income was received in the normal course of the previous employment and there was no expectation by the official at the time the official assumed office of renewed employment with the former employer. You have indicated that at the time Mr. Minnema joined the JPA he had no expectation of renewed employment with MTCO.

The principal of the note accrued during Mr. Minnema’s employment with MTCO. Therefore, payments of principal made after joining the JPA are not income. However, unlike principal, interest on the note accrues as it becomes due and, therefore, the exception does not apply. You state that the interest payments exceed \$500 within a twelve-month period. Therefore, MTCO is a source of income to Mr. Minnema. (*See Holzhaus Advice Letter, No. I-14-218.*)

INVESTMENT IN A BUSINESS ENTITY

Section 87103(d) provides that an official has a financial interest in any business entity in which the official has a direct or indirect investment of \$2,000 or more.

Under Section 82034, an “investment” includes any financial interest in a debt instrument. In the *Holzhaus Advice Letter*, [supra] we said that an official had an investment interest in his former employer where the employer purchased the official’s stock with a five-year note because a note is a debt instrument. Here too, MTCO paid Mr. Minnema for redemption of his shares with a

promissory note. Therefore, he has an investment interest in MTCO if the value of the note is \$2,000 or more.

Foreseeability

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of a license, permit, or other entitlement to, or contract with, the financial interest.

If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).)

1. Contracts with MTCO: A decision to award MTCO the contract involves the issuance or approval of a contract and, therefore, any financial effect on MTCO is reasonably foreseeable.

2 and 3. Decisions not involving MTCO: These decisions would not be explicitly involved and the effects, if any, would be reasonably foreseeable only if they can be recognized as a realistic possibility and more than hypothetical or theoretical. Without knowing the nature of each individual decision, we cannot say whether the financial effects of such decisions on MTCO would be reasonably foreseeable. Thus, we do not further analyze these questions.

Materiality

Recently revised Regulation 18702.1 provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on a business entity, including a source of income that is a business entity, in which an official has an interest is material. As relevant to the facts, the financial effect will be material if the business entity bids on or enters into a written contract with the official's agency. Because MTCO will be bidding on the Contract, the reasonably foreseeable financial effect of the decision is material.

Accordingly, Mr. Minnema may not make, participate in making or influence the JPA board on decision regarding the Contract.

Segmentation

Generally, the conflict of interest rules of the Act are applied on a decision-by-decision basis. For example, even related decisions can be analyzed separately. In cases where an official has a conflict of interest with one decision, he or she is not disqualified from other decisions so long as they are not inextricably interrelated. Regulation 18709 provides the method for segmentation of a governmental decision:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

Based on Regulation 18706, Mr. Minnema may participate in the decisions in which he does not have a conflict of interest, (such as Sector D2 and Project Decisions that do not involve the Contract), so long as (1) the decisions will not result in a reopening of, or otherwise financially affect, decisions regarding the Contract and (2) Mr. Minnema does not have an independent interest in these decisions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

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